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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 257

In the Matter of
The Application of MATTHEW J. REDDEN,
Petitioner,

For an Order under Article 78 of the Civil Practice Act and Article 78 of the Civil Practice Law and Rules,

vs.

MICHAEL J. MURPHY, as Police Commissioner of the City of New York,
Respondent,

and

NEW YORK CITY MUNICIPAL CIVIL SERVICE COMMISSION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petitioner prays that a writ of certiorari issue to review the judgment of the Court of Appeals of the State of New York, denying petitioner's motion for leave to ap-

peal to the Court of Appeals from an order of affirmance of the Appellate Division of the Supreme Court of the State of New York.

Opinions Below

The opinions in the Court of first instance are set forth in the certified copy of the record herein and said opinions were affirmed without opinion by the Appellate Division, of the Supreme Court, State of New York (1st Dept.), on October 7, 1965, which Court denied motion for leave to appeal by order dated December 23, 1965. The Court of Appeals of the State of New York further denied motion for leave to appeal by order dated March 24, 1966.

Jurisdiction

The motion to the New York State Court of Appeals for leave to appeal was denied on March 24, 1966 and was duly entered and filed in the office of the Clerk of the Court of Appeals on March 24, 1966.

The jurisdiction of this Court is invoked pursuant to the authority of 28 U.S.C. 1257 (3).

Questions Presented

1. May a candidate for promotion under civil service be constitutionally denied such promotion on the basis of alleged hearsay statements made to an investigator, when such witnesses were not produced for cross examination or confrontation by the candidate for a non-sensitive position?

2. May a candidate for civil service be judged at a hearing during which he was denied the right of counsel although duly demanded during his testimony, and during which he was denied the right of presence during the remainder of the said hearing?

3. May an alleged transcript of testimony and the exhibits attached thereto which are challenged as being incorrect, altered and distorted without rebuttal, be constitutionally utilized to deprive such candidate of his competitive civil service promotion; and may an additional alleged transcript of testimony at a hearing at which petitioner was not present, and which transcript was not made available to petitioner be similarly utilized?

4. Does the act of the New York City Civil Service Commission and the New York City Police Commissioner in violation of the New York State Constitutional provision by arbitrary and unilateral acts, treating candidates on a basis manifestly unequal, violate the equal protection clause of the Federal Constitution?

5. Are the action of the administrative agency and the action of the State Courts in their review judiciable in this Court as coming within the delineation imposed by the requirements of due process?

6. Should certiorari be granted in view of the manifest interest of all civil service employees whose careers are presumed to be determined by objective competitive examination and the protection of the constitutional safeguards in such administrative disciplinary proceedings as are provided by statute, as evidenced by the affidavit of William V. Cosgrove, President, of the Lieutenants Benevolent Association, as representing all lieutenants in the New York City Police Department presented in the New York State Court of Appeals in support of the motion of petitioner for leave to appeal to the Court of Appeals of the State of New York?

Constitutional and Statutory Provisions Involved

United States Constitution, Amendment XIV, Section 1:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to

any person within its jurisdiction the equal protection of the laws.

New York State Constitution, Article 5, Section 6 (McKinney's Consolidated Laws of New York Annotated, Book 2, Part 2, Constitution, p. 9 of 1965 pocket supplement), reads in pertinent part:

> Appointments and promotions in the civil service of the state and all of the civil subdivisions thereof, including cities and villages, shall be made according to merit and fitness to be ascertained, as far as practicable, by examination which, as far as practicable, shall be competitive . . .

New York State Civil Service Law, Section 20 Subdivision 1 (McKinney's Consolidated Laws of New York Annotated, Book 9, pp. 12, 13, of 1965 pocket supplement) reads in pertinent part:

> Each municipal civil service commission shall prescribe, amend and enforce suitable rules for carrying into effect the provisions of this chapter and of section six of Article five of the constitution of the State of New York, including rules for the jurisdictional classification of the offices and employments in the classified service under its jurisdiction, for the position classification of such offices and employments, for examinations therefor and for appointments, promotions, transfers, resignations and reinstatements therein, all in accordance with the provisions of this chapter.

Constitutional and Statutory Provisions

§ 1257. State Courts; appeal; certiorari

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

> (3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in

question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States. June 25, 1948, c. 646, 62 Stat. 929.

Petitioner's Contentions

The federal questions are presented by reason of the fact that petitioner, a candidate for promotion, was denied such promotion on the basis of a primary hearing at which he was present but wherein the evidence submitted against him was based upon alleged statements of persons not present and whom the petitioner did not have an opportunity to confront or cross examine, and at a subsequent hearing wherein petitioner was not present and testimony was taken of witnesses of whom petitioner was and is unaware and did not have an opportunity to confront or cross examine, and at which petitioner was denied the right of counsel.

Petitioner was furthermore deprived of the promotion by reason of an altered and distorted record upon which the State Courts relied in denying petitioner's right to review, and which record was challenged without rebuttal.

Petitioner was denied equal protection of the laws by reason of the fact that the New York City Police Commissioner and the New York City Civil Service Commission arbitrarily and in violation of the Constitution of the State of New York, Article 5, Section 6, promoted in petitioner's place and stead persons who had failed the examination which had been passed by petitioner.

The denial of the opportunity for employment is judiciable and the requirements of due process are applicable.

Statement of Facts

The petitioner herein, Matthew J. Redden, a lieutenant in the New York City Police Department, took and passed the examination for captain in the said Department and was duly certified as eligible for such promotion. As of this date petitioner has not been promoted although others who failed the same examination and who were in the same group of candidates have been so promoted.

The respondents in their answer set forth their reason for not promoting petitioner, which included transcripts of certain disciplinary charges, the accuracy of which were challenged by petitioner in the Courts below (455-456). One basis respondent gave involves old charges, never brought to trial, which were officially dropped subsequent to the initial denial of petitioner's application for relief in the State Courts (48); another basis given by respondents was an administrative hearing charging alleged clerical errors and not involving any charge whatever of moral turpitude. Petitioner was found guilty of the charges as made.

Appeal was duly taken from the said administrative hearing on the basis of petitioner's challenges to the record upon which the findings of guilt were made. Encompassed in the challenges were: perjured testimony, altered exhibits, incorrect transcript, inaccurate findings, a hearing at which petitioner was denied counsel and even physical presence at all times, or a transcript of the testimony taken although duly demanded, motion for the production of which transcript was denied by the State Courts. Respondent made no denial to the challenges to the record and to the exhibits referred to herein.

The State Courts affirmed the findings of the Commissioner and the New York State Court of Appeals denied the application for leave to appeal without opinion. This is an application for certiorari to the New York State Court of Appeals.

REASONS FOR GRANTING THE WRIT

POINT I

An authoritative ruling is mandated in the instant case on the issue of whether or not petitioner was denied due process of law in view of the knowing use of perjured testimony and the refusal of the Trial Commissioner to permit the confrontation of adverse witnesses, this action is judiciable.

In the instant case not merely were there challenges made to the record as presented (32, 35) but also the assertion was made and unchallenged by respondent that perjured testimony was deliberately utilized by respondent (49). The constitutional requirement of due process is not satisfied when a conviction is obtained by presentation of testimony known to the prosecuting authority to be perjured. *Mooney* v. *Holohan,* 294 U. S. 103.

The Fourteenth Amendment is not confined to state action but applies also to the conduct of such responsible ministerial agencies of the state as accomplish what is denounced by the amendment. *Mayor etc. of Jersey City* v. *Central R.R. Co. of N. J.,* 212 Fed. 76, affirming 199 Fed. 237, see also: *Greenbaum* v. *Bingham,* 201 N. Y. 343; *People Ex Rel. Kasschau,* 155 N. Y. 43, and *Grottano* v. *Kennedy,* 5 N. Y. 2d. 381, holding that the rule governing Judicial Tribunals applied in hearings before Trial Commissioners of the New York City Police Department. The Courts below ignored these ruling authorities and the constitutional procedural safeguards.

That this case is judiciable is now well settled. Petitioner has been excluded from his occupational promotion in contravention of the due process clause in the same manner as though he had been prevented from practicing law by being deprived of promotion into the area of police administration for which his education and training had amply qualified him. *Re Summers,* 325 U. S. 561, 568.

In *Willner* v. *Committee on Character and Fitness,* 373 U. S. 96, mere unsworn statements were utilized in denying the application of petitioner. Petitioner therein, as in the instant case, alleged that he was never afforded the opportunity of confronting his accusers; of having the accusers sworn and cross examining them; and the opportunity of refuting the accusations and the accusers. In the instant case, in addition thereto, the petitioner took the stand and testified, denying the aforesaid unsworn statements. In *Willner* it was pointed out that the findings made were based upon unsworn statements, that the presence of cross examination is the determinant of due process and further indicated that procedural due process requires confrontation and cross examination of those whose word deprives a person of his livelihood. *Schware* v. *Board of Bar Examiners,* 353 U. S. 232, 238, 239. In *Ex parte Garland* (U. S.), 4 Wall. 333, 379, the right was held as not "a matter of grace or favor." See also: *Goldsmith* v. *U. S. Board of Tax Appeals,* 270 U. S. 117, holding that those within a class qualified for a particular position may not be rejected upon the exercise of discretion, except after fair investigation, with such notice, hearing and opportunity to answer for the applicant as would constitute due process (citing cases). The fact that this rule would apply to any occupation is shown in *Cafeteria & Restaurant Workers Union* v. *McElroy,* 367 U. S. 886, which involved only the opportunity to work only at one isolated and specific military installation. In *Greene* v. *McElroy,* 360 U. S. 474, 492, 497, the Court held that the right to hold a specific employment and to follow a chosen profession comes within the liberty and property concepts of due process.

In the case at bar, petitioner was convicted by unsworn statements of civilian witnesses not produced (415-417). Significantly, the State Court on oral argument indicated that much of the hearsay evidence could have been at-

tributed to such other factors as self protection by other police officers and an attempt by them to absolve themselves of responsibility. It was further pointed out that these additional civilian witnesses were under the control of the very Police Department which instituted the proceedings and could have been produced. The holding in *Greene, supra,* is pertinent in that Court pointed out that where the evidence consists of the testimony of individuals who may be motivated by malice, vindictiveness or other motives unrelated to truth telling are presented, the Court has formalized the protections of the defendant in the requirements of confrontation and cross examination as a matter of due process has been extended not only in criminal cases, e.g., *Mattox* v. *United States,* 156 U. S. 237, 242-244, *Kirby* v. *United States,* 174 U. S. 47, *Motes* v. *United States,* 178 U. S. 458, 474, *Re Oliver,* 333 U. S. 257, 273, but also in all types of cases where administrative and regulatory actions were under scrutiny, e.g., *Southern R.R. Co.* v. *Virginia,* 290 U. S. 190, *Ohio Bell Tel. Co.* v. *Public Utilities Com.,* 301 U. S. 292, *Morgan* v. *United States,* 304 U. S. 1, 19, *Carter* v. *Kubler,* 320 U. S. 243, *Reilly* v. *Pinkus,* 338 U. S. 269.

That confrontation and cross examination under oath are essential to due process, and that a fair trial requires the production of the accuser so that cross examination can test his character and reliability, are elements of due process explicitly shown in the concurring opinion of Douglas, J. in *Peters* v. *Hobby,* 349 U. S. 331, and a separate opinion of Douglas, J. and Black, J.J. in *Beard* v. *Stahr,* 370 U. S. 41.

Petitioner was convicted upon a statement in the nature of a confession which was introduced into evidence (189, 363) which petitioner challenged as having been altered, to which petitioner was denied access, the alleged verbatim transcript of which is false, and which statement was further distorted in oral presentation. Three contradictory

versions of petitioner's statement were presented and relied upon in the determination made herein. In addition to such statement the sole basis of the charge against petitioner was the alleged statements of civilians who were not produced before the Court although they were the prime witnesses to the events complained of and although concededly under the control of the respondent Police Department (415-416). Thus petitioner had no opportunity to confront and to cross examine the witnesses presented against him.

The criteria for due process is set forth in *re Carter*, 192 F. 2d 15. The Court there held that an essential of due process requires a hearing and revelation of data upon which a decision is to be based, negation of old charges never brought to trial or charges made by anonymous informants whom the applicant has had no opportunity to confront and cross examine. While it is true in the instant case that a hearing was held (33), there was however no full and fair adversary hearing. Clearly all data utilized in the decision of the Commissioner were not presented for scrutiny by petitioner. Old charges, never brought to trial which were officially dropped subsequent to the initial denial of petitioner's application for relief in the State Courts were considered by the Commissioner and the State Courts in violation of the precepts of In *re Carter, supra* (48).

This Court has shown a profound concern in challenges made to administrative hearings wherein there was an improper denial of the right to cross examination. This profound concern has been manifested in cases involving the Civil Service. In *Williams* v. *Zuckert*, 371 U. S. 531 (1963), the majority of this Court subscribed to the precepts of the minority to the effect that the denial of the right of confrontation of witnesses in a case involving right to employment is equivalent to denial of due process, citing *Vitarelli* v. *Seaton*, 359 U. S. 535. Upon re-

argument, the majority of this Court remitted the action to the lower Court for further deliberation as to whether or not such compliance with due process had been had. The inference is thus inescapable that the basic doctrine as enumerated by the original dissent was adopted by the entire Court.

Mr. Justice Douglas' opinion points out:

> "Confrontation and cross examination are, as I understand the law, vital when one's employment rights are involved. See *Greene* v. *McElroy*, supra, 496; *Beard* v. *Stahr*, 370 U. S. 41, 43 (dissenting opinion). Petitioner is not merely being 'denied . . . the opportunity to work at one isolated and specific military installation.' *Cafeteria & Restaurant Workers Union* v. *McElroy*, 367 U. S. 886, 896. The stigma now attached to him will follow him, whatever employment he seeks. The requirements of due process provided by the Fifth Amendment should protect him against this harsh result by giving him the same right to confront his accusers as he would have in a criminal trial. See *Mattox* v. *United States*, 156 U. S. 237; *Kirby* v. *United States*, 174 U. S. 47, 55; *Curtis* v. *Rives*, 123 F. 2d 936, 938."
>
> "But one who desires confrontation with the accuser has such a conflict of interest with his adversary that he, rather than his opponent can better determine what would or might be useful to his defense. I would say that this important constitutional right was lost on the technicality the Court now embraces."

This Court thus set forth the appropriate constitutional standard in *Vitarelli* v. *Seaton*, *supra*. Even in actions when national security (certainly not present in this case) required that certain witnesses not be exposed, this Court pointed out that, "Scrupulous observance of Departmental safeguards is clearly of utmost importance."

Not merely is there a constitutional requirement, but the rules of the very Police Department involved require the following:

> "21/27.0 The department counsel *shall* introduce the witnesses for the department. The witnesses *shall* be sworn by the Trial Commissioner. The department counsel *shall* conduct the direct examination of his witness. At its conclusion, the witness *shall* be available for cross-examination, followed, in the discretion of the Trial Commissioner, by re-direct and re-cross."

Significantly, these regulations mandate these procedures, and mandate the confrontation of witnesses and is discretionary with no one. This section, 21/27.0 is in perfect harmony with the *Williams* case, cited *supra,* and forecloses the issue. Civil Service Law, Section 20, subdivision 1 gives this regulation the force and effect of law.

POINT II

Petitioner was denied due process by reason of the utilization of the transcript of testimony and the exhibits introduced in evidence which were challenged as being incorrect and altered without rebuttal.

It is alleged herein that an erroneous and falsified transcript of the trial proceedings appealed from was presented by the prosecuting officials (32, 35), that objection had been made thereto and that no denial was made to such allegation. It was upon the basis of this transcript that the Trial Commissioner and subsequently the Police Commissioner based their findings and determination. The decision in *Chessman* v. *Teets,* 350 U. S. 3, effectively pronounces the doctrine that where a charge of fraud in the presentation of the transcript of the trial proceeding has been made, the charge of fraud as such presented the federal question and when established or effectively presented, set forth a denial

of due process of law in violation of the Fourteenth Amendment. Citing *Mooney* v. *Holohan*, 294 U. S. 103.

The constitutional question was raised and presented before the State Courts and the Administrative Agency. Immediately upon receipt of the transcript, objection was made to its accuracy. No response was made in denial of this charge. The Police Commissioner himself, after the main hearing herein referred to recognizing the validity of this charge, ordered an investigation, referring in a memorandum (49) to "variances of testimony", and stating that it appeared to him the case should be re-heard.

The trial transcript contained various exhibits relating to material matters in the charges as presented. The assertion was made and unchallenged that an official police record, the police blotter, was altered and distorted in the transcript presented by respondent (388 lines 10-12). This was the very basis alleged in the Trial Commissioner's findings of guilt (66-1). Claim was made, without denial, that the findings of the Trial Commissioner as included in the transcript and presented to the Court and to the petitioner (168) did not accurately set forth the findings as made (66). Furthermore the respondent failed to include in the transcript the Police aided card, which was introduced and marked in evidence. It was only on motion in the State Courts that this exhibit was produced by the respondent. Examination of such aided card showed that subsequent to the hearing and at a time unknown to petitioner a material and wilful alteration and change was made in this official police record by the super-imposition in ink in a typewritten report by persons unknown to petitioner. This exhibit was at all material times in the hands of the respondent Police Commissioner and was material to several of the charges. Challenge was also made to an alleged statement by petitioner referred to in Point I.

The New York State Constitution and statutes and applicable decisions make it mandatory that the Appellate

Courts review the entire record in every proceeding such as those in the instant case and to render a decision based upon a genuine and complete record. To determine whether or not the record in the instant proceeding was genuine and accurate depends upon facts apart from the record, the truth or falsity of which may only be determined as the result of a full and fair adversary hearing. *Walker* v. *Johnston*, 312 U. S. 275. That the Police Commissioner recognized this principle is shown by his memorandum above referred to and ordered additional hearings which were held and a record made (33). There was however no full and fair adversary hearing. No transcript of the testimony was ever presented to petitioner, who was and still is totally unaware of the nature and extent of the testimony adduced against him. Motions were made for the production of such transcript which were denied by the State Court. Thus petitioner was denied the protection of due process by reason of the failure to present the transcript.

As was pointed out to the Court in *Chessman* v. *Teets*, *infra*, there can be no legal distinction between the knowing presentation by the prosecution of perjured testimony on the one hand and the knowing submission of a spurious record on appeal procured by extrinsic fraud and perjury on the other hand. *Cole* v. *Arkansas*, 333 U. S. 196; *Frank* v. *Mangum*, 237 U. S. 309. The acquiescence of the State Appellate Courts in affirming the findings based upon such improper and perjured testimony is subject to constitutional review. *Frank* v. *Mangum, supra.* The proceedings in the State Appellate Tribunal are to be regarded as part of the process of law which has been applied in this particular action. By the terms of the memorandum of the Police Commissioner above referred to, acknowledgment was made of the existence of perjury (49).

Respondent made no denial of the challenges to the record and to the exhibits referred to herein. It was pointed out in the State Courts that while it was true that

administrative agencies are empowered by statute to adopt rules for their own management, nevertheless such rules must be fair and comply with the concepts of due process. Thus, the Federal Question was promptly and properly raised.

Petitioner urged upon the Courts below pursuant to the applicable law that a trial of the issues including those of the validity and correctness of the record as presented should have been had. The state statutes themselves make specific provision for a trial of the issues where the record is challenged. Art. 78 C.P.L.R.

In as much as the State Courts denied the right to a hearing to determine whether or not the record was accurate and properly presented, petitioner was denied the opportunity to establish the very facts that would indicate the denial of due process.

POINT III

Petitioner was denied due process by reason of having been judged at a hearing during which he was denied the right of counsel although duly demanded during his testimony, and during which he was denied the right of presence during the remainder of said hearing, and the right of a transcript of the record at any time.

Subsequent to the original hearing, petitioner was interviewed by the then Police Commissioner, and petitioner pointed out why the original trial was unfair, improper and illegal (14, 15, 49). Subsequently, the Police Commissioner on February 18, 1961 issued a memorandum directed to the respondent, Michael J. Murphy, then Chief Inspector, indicating the possibility that perjured testimony was utilized and stating that it appeared to him the case should be re-heard (49).

Pursuant to this directive, additional hearings were held on March 6, 1961 and on March 27, 1961 (33). There was however no full and fair adversary hearing. He ordered and there was held a star chamber proceeding. Concededly, petitioner appeared with counsel who was denied admission to the hearing room. Petitioner was given no opportunity to confront or cross examine the witnesses heard against him or to rebut their testimony.

Petitioner upon being interrogated asked for the advice of counsel and was refused. He categorically stated that he would continue to testify if he could consult the attorney of his choice. It is significant that the testimony of petitioner was cut short when he repeated and reiterated his demand for counsel, which demand was refused, although petitioner's counsel who had accompanied him, was present in the building and was outside the hearing room. Petitioner sought the advice of counsel not merely as to the presentation of his own defense but in the confrontation of opposing witnesses. Intimidation however was engaged in upon petitioner's demand for counsel. Then the Board of Officers which sat as a Hearing Tribunal threatened petitioner with departmental discipline if he did not comply with their direction to testify without benefit of counsel. That such denial of counsel is equivalent to the denial of due process is now well settled. *Massiah* v. *United States*, 377 U. S. 201, and *Gideon* v. *Wainwright*, 372 U. S. 335.

This procedure, violative of the basic concepts of due process, was challenged below and presents a most significant consideration for the granting of certiorari herein.

POINT IV

Petitioner was denied equal protection of the laws by reason of the action of the Police Commissioner and of the Civil Service Commission in violation of the State constitutional provision by treating candidates on a basis manifestly unequal by giving precedence of promotion to unsuccssful candidates.

A material federal question is presented by reason of the fact that petitioner was denied equal protection of the laws by virtue of the action of the respondent Police Commissioner in violating the state constitutional provision requiring civil service promotion be upon equal competitive basis.

The examination for Captain involved in this case has been the subject of extensive litigation. The history of the pertinent examination reveals the undisputed facts which emerge from the ensuing litigation:

(1) Petitioner passed the said examination and was certified for appointment (161).

(2) Others who did not pass the examination have been appointed (125).

(3) Petitioner allegedly was denied appointment solely by reason of the allegation that he was on probation by reason of findings which were herein challenged as being without basis (130).

(4) The motive of the Police Commissioner in not promoting petitioner was to afford an opportunity for certain persons who had not passed the examination to be promoted to Captain in petitioner's place and stead (124).

This situation arose when the examination for Captain was challenged by five persons, who brought action to

have their names placed on the list alleging fraud and manifest error (*O'Leary* v. *Schechter*, 11 A. D. 2d 758, 1st Dept. 1960). The State Court in that action ordered a hearing, which came on for trial and therein the Court stated that the methods used by the City were improper and illegal. A mistrial was subsequently ordered. These five candidates had failed the examination. Thereafter, a panel of special examiners rerated their papers on several occasions without granting passing grades to such candidates, whereupon the Civil Service Commission arbitrarily granted the identical minimum passing grade to each without regard for his actual rating.

Thus the Civil Service Commission acted without basis in law, in arbitrarily and capriciously placing names on a Civil Service Promotion List without regard to "MERIT AND FITNESS" by "COMPETITIVE EXAMINATION" as commanded by Article V, Section 6 of the *New York State Constitution*, the *Civil Service Law*, Section 20, subdivision 1.

It is to be noted that there were sufficient vacancies to accommodate all passing candidates including petitioner, plus two additional vacancies. Because one of the five original litigants had retired from the Police Department there remained four candidates to be accommodated by this non-competitive arbitrary rating, all of whom had failed the examination, two persons on the list who had passed the examination had to be removed from consideration and this was done.

Respondent acknowledged in *Singer* v. *Schechter*, 17 A. D. 2d 204, dealing with another group of failing candidates, that these four appointments, cited *supra*, were made illegally and argued simply that such illegality does not warrant further illegality. This was argued in the State Court but is totally inapplicable to the petitioner who was a passing candidate, and was the very one wronged by these admitted illegal appointments.

Thus the respondent Police Commissioner acted in clear violation of the aforementioned provisions of the State Constitution Article V, Section 6. The petitioner has been denied the equal protection of the laws pursuant to the Fourteenth Amendment by the clear disregard by the state agency of the state constitutional requirement of Article V, Section 6 mandating that Civil Service promotion be by objective competitive examination and by equality of treatment.

Certiorari should be granted in the face of the admission by the State Agency that it violated its own constitutional provisions. To permit the wrongs visited upon this petitioner to be left unrectified by this Court will permit similar abuse in the future in the several States. Frequent challenges are made to the action of State Officials concerning their compliance with State Constitutional Provisions. Definitive ruling is required in order to provide a guideline for both administrative officials and candidates. Certainly the instant case is a proper one to be reviewed in establishing such guidelines as the egregious nature of the action of the administrative official is manifest and conceded by such official.

CONCLUSION

For the reasons stated, the petitioner respectfully prays that the writ of certiorari be granted.

Respectfully submitted,

ERNEST RASSNER,
Attorney for Petitioner.

IRWIN ASOFSKY,
RONALD PODOLSKY,
Of Counsel.

Order of Affirmance.

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department of the County of New York, on the 7th day of October, 1965.

Present—Hon. CHARLES D. BREITEL,
Justice Presiding,
" BENJAMIN J. RABIN,
" FRANCIS L. VALENTE,
" JAMES B. M. MCNALLY,
" ARON STEUER,
Justices.

9235, 9236, 9237

In the Matter of the Application of

MATTHEW J. REDDEN,

Petitioner-Appellant,

for an order under Article 78 of the Civil Practice Law and Rules,

vs.

MICHAEL J. MURPHY, as Police Commissioner of the City of New York,

Respondent-Respondent,

and

NEW YORK CITY MUNICIPAL CIVIL SERVICE COMMISSION,

Respondent.

An appeal having been taken to this Court by the petitioner-appellant from three orders of the Supreme Court,

Order of Affirmance.

New York County: (1) entered on January 22, 1963, dismissing the petition, (2) entered on December 3, 1963, denying petitioner's application for leave to renew; and (3) entered on July 29, 1964, denying petitioner's application for leave to renew, and said appeal having been argued by Mr. Irwin Asofsky of counsel for the appellant, and by Mr. Jesse I. Levine of counsel for the respondents; and due deliberation having been had thereon,

It is hereby unanimously ordered that the orders so appealed from be and the same are hereby affirmed with $30 costs and disbursements to the respondents.

Enter:

HYMAN W. GAMSO,
Clerk.

Order of Appellate Division Denying Leave to Reargue.

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on the 23rd day of December, 1965.

Present—Hon. CHARLES D. BREITEL,
Justice Presiding,
" BENJAMIN J. RABIN,
" FRANCIS L. VALENTE,
" JAMES B. M. MCNALLY,
" ARON STEUER,
Justices.

5

In the Matter of the Application of

MATTHEW J. REDDEN,

Petitioner-Appellant,

For an order, etc.,

vs.

MICHAEL J. MURPHY, as Police Commissioner of the City of New York,

Respondent-Respondent.

The above named petitioner-appellant having moved for leave to reargue his appeals from three orders of the Supreme Court, New York County entered on January 22, 1963, December 3, 1963 and July 29, 1964, which orders

Order of Appellate Division Denying Leave to Reargue.

were unanimously affirmed by order of this Court entered on October 7, 1965, or, in the alternative, for leave to appeal to the Court of Appeals,

Now, upon reading and filing the notice of motion, with proof of due service thereof, and the affidavit of Irwin Asofsky in support of said motion, and the affidavit of Jesse I. Levine in opposition thereto, and after hearing Mr. Irwin Asofsky for the motion, and Mr. Jesse I. Levine opposed,

It is hereby unanimously ordered that the said motion be and the same is hereby denied with $10 costs.

Enter:

HYMAN W. GAMSO,
Clerk.

Order of Court of Appeals Denying Motion for Leave to Appeal.

STATE OF NEW YORK,

IN COURT OF APPEALS

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the Twenty-fourth day of March A. D. 1966.

Present, HON. CHARLES S. DESMOND, Chief Judge, presiding.

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1 Mo. No. 160

In the Matter of

the Application of MATTHEW J. REDDEN,

Appellant,

For an Order &c.

vs.

MICHAEL J. MURPHY, as Police Commissioner of the City of New York,

Respondent,

and

NEW YORK CITY MUNICIPAL CIVIL SERVICE COMMISSION,

Respondent.

A motion for leave to appeal to the Court of Appeals in the above cause having been heretofore made upon the part of the appellant herein and papers having been duly submitted thereon and due deliberation thereupon had:

Order of Court of Appeals Denying Motion for Leave to Appeal.

ORDERED, that the said motion be and the same hereby is denied.

(SEAL) A copy

GEARON KIMBALL,
Deputy Clerk.

(38444)

SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
JUL 21 1966
JOHN E. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1966

No. 257

IN THE MATTER OF

The Application of MATTHEW J. REDDEN,

Petitioner,

For an Order under Article 78 of the Civil Practice Act and Article 78 of the Civil Practice Law and Rules,

against

MICHAEL J. MURPHY, as Police Commissioner of the City of New York,

Respondent,

and

NEW YORK CITY MUNICIPAL CIVIL SERVICE COMMISSION,

Respondent.

MEMORANDUM IN OPPOSITION OF RESPONDENTS, MICHAEL J. MURPHY, *ET ANO.*

J. LEE RANKIN
Corporation Counsel
Attorney for Respondents

SEYMOUR B. QUEL
JESSE I. LEVINE,
of Counsel.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. .....

In the Matter of

The Application of MATTHEW J. REDDEN,

Petitioner,

For an Order under Article 78 of the Civil Practice Act and Article 78 of the Civil Practice Law and Rules,

against

MICHAEL J. MURPHY, as Police Commissioner of the City of New York,

Respondent,

and

NEW YORK CITY MUNICIPAL CIVIL SERVICE COMMISSION,

Respondent.

MEMORANDUM IN OPPOSITION OF RESPONDENTS, MICHAEL J. MURPHY, *ET ANO.*

Petitioner brought a proceeding to review and annul the determination of the Police Commissioner finding petitioner guilty of violations of departmental rules and regu-

lations after a hearing, and further, seeking to compel the Commissioner to appoint petitioner to the office of Captain, New York City Police Department.

The petition was properly dismissed on the grounds that the relief sought with respect to the disciplinary hearing was barred by the statute of limitations, Civil Practice Act, Section 1286; *Matter of Mahony* v. *Conway,* 281 App. Div. 1057 (3d Dept., 1953), 121 N. Y. S. 2d 556; *Matter of Hall* v. *Leonard,* 260 App. Div. 591, 23 N. Y. S. 2d 360, aff'd 285 N. Y. 719 (1941), 34 N. E. 2d 893; *Matter of Green* v. *City Civil Service Commission,* 4 Misc 2d 186 (Sup. Ct., N. Y. Co., 1956), 157 N. Y. S. 2d 851; and that the appointment of petitioner to the position of Captain, more than four years after the expiration of the eligible list, was a legal impossibility. *Matter of Turel* v. *Delaney,* 287 N. Y. 15 (1941), 38 N. E. 2d 411; *Matter of Berger* v. *Walsh,* 291 N. Y. 220 (1943), 52 N. E. 2d 105; *Matter of Cash* v. *Bates,* 301 N. Y. 258 (1950), 93 N. E. 2d 835; *Matter of Singer* v. *Schechter,* 17 A D 2d 204 (1st Dept., 1962), 233 N. Y. S. 2d 483.

The opinion of Supreme Court, New York County, affirmed by the Appellate Division, First Department, without opinion, makes it absolutely clear that the grounds for dismissal of the petition in the State Courts were independent of the allegedly constitutional questions raised by petitioner. Such independent grounds for dismissal are adequate under New York law, as indicated above. The alleged Federal questions raised by petitioner were not considered in the State Courts, nor should they have been so consid-

ered. The petition is patently without merit. *Lynch, et al.* v. *New York ex rel. Pierson,* 293 U. S. 52 (1934).

July 18, 1966.

Respectfully submitted,

J. Lee Rankin
Corporation Counsel
Attorney for Respondents

Seymour B. Quel,
Jesse I. Levine,
of Counsel.

Office-Supreme Court, U.S.
FILED
SEP 1 1966
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1966

No. 257

MATTHEW J. REDDEN,

Petitioner,

against

MICHAEL J. MURPHY, as Police Commissioner of the City of New York,

Respondent,

and

NEW YORK CITY MUNICIPAL CIVIL SERVICE COMMISSION,

Respondent.

MEMORANDUM IN REPLY TO RESPONDENT'S MEMORANDUM

ERNEST RASSNER,
Attorney for Petitioner.

IRWIN ASOFSKY,
RONALD PODOLSKY,
of Counsel.

IN THE

Supreme Court of the United States

October Term, 1966

No. 257

MATTHEW J. REDDEN,

Petitioner,

against

MICHAEL J. MURPHY, as Police Commissioner of the City of New York,

Respondent,

and

NEW YORK CITY MUNICIPAL CIVIL SERVICE COMMISSION,

Respondent.

MEMORANDUM IN REPLY TO RESPONDENT'S MEMORANDUM

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

This memorandum is respectfully submitted to correct the distortion and misstatement of fact by the Respondent Police Commissioner of the City of New York as set forth in the memorandum in opposition. It is simply not true as alleged by Respondent, that the relief sought in the state courts was held to be barred by the statute of limitations; or that relief was denied on the ground that the appointment of petitioner was a legal impossibility. At no time did any of the state courts rule on these issues, although argument to that effect was urged upon the courts by Respondent. The Appellate Division and the Court of

Appeals affirmed without opinion, although as set forth in the Petition and conceded in the memorandum in opposition the constitutional issues were duly presented.

Lynch, et al v. *New York, ex rel. Pierson*, 393 U. S. 52 (1934), cited by Respondent is distinguishable inasmuch as the federal questions in the instant case were necessary to the determination of the cause, and the judgment as rendered could not have been given without deciding them, for the basis of the relief sought was the denial of constitutional rights, in view of the fact that both the transcript of the proceedings upon which it was based and the very procedures followed therein, were challenged upon constitutional grounds. Significantly, at no point in the memorandum in opposition was any challenge made in fact or in law to the assertions in the petition of the denial of the constitutional rights of Petitioner.

Respectfully submitted,

ERNEST RASSNER,
Attorney for Petitioner.

IRWIN ASOFSKY,
RONALD PODOLSKY,
of Counsel.